Supreme Court, U.S.
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No. 91-1595

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JAY H. GLASSER,

Petitioner,

v.

A. H. ROBINS COMPANY, INC. and
THE DALKON SHIELD CLAIMANTS TRUST,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE DALKON SHIELD CLAIMANTS TRUST IN OPPOSITION

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QUESTION PRESENTED

Whether the district court's Order denying petitioner Jay Howard Glasser's Motion seeking to be released from the protective orders entered in this proceeding constitutes an abuse of discretion or a violation of Glasser's first amendment right of free speech.*

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* In this Brief the petitioner, Jay Howard Glasser, will be referred to as "Glasser." The respondent, the Dalkon Shield Claimants Trust, which was substituted by the court of appeals as appellee in lieu of A.H. Robins Company, Inc., will be identified as the "Trust." The A.H. Robins Company, Inc. will be called "Robins." References to the Appendix attached to Glasser's Brief will be made by ("Pet. App. at ——."). Glasser's Brief, will be referred to as "Glasser Brief" with the relevant page number. Other terms or items will be defined in the text as necessary.

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STATEMENT

This case arises out of the bankruptcy proceeding involving A.H. Robins Company. Robins petitioned for bankruptcy in 1985 following the institution of thousands of lawsuits against it involving the Dalkon Shield, an intrauterine birth control device. In formulating a plan of reorganization, the district court was required to estimate the value of unliquidated claims against Robins that would eventually be handled through the Dalkon Shield Claimants Trust.[1]

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[1] The Trust was established under Robins' Sixth Amended and Restated Plan of Reorganization in order to compensate holders of Dalkon Shield personal injury claims. The Plan discharges Robins

On March 21, 1986, the district court appointed Professor Francis McGovern as an expert to advise the court on the estimation of the amount and extent of claims arising from injuries caused by use of the Dalkon Shield. Professor McGovern determined that information essential to the performance of his duties was contained in the several thousand files on Dalkon Shield claims and suits resolved by settlement or judgment before Robins filed its bankruptcy petition (the "Closed Files"). The Closed Files were then in the possession of Robins, its insurer, Aetna Casualty and Surety Company, and counsel for the plaintiffs and defendants in the individual actions. They contained highly personal information about the claimants and their medical histories. Such information, along with the data in the files on the historical values of these claims, *i.e.*, the amounts for which they had been settled or reduced to judgment, was seen as critical to the effort to estimate the value of the contingent and unliquidated tort liability claims against Robins arising from the Dalkon Shield. Many of the files were subject to individual confidentiality agreements entered by the parties.

Consequently, on July 10, 1986, the district court entered the first of three protective orders directing that the Closed Files be produced to Professor McGovern for his use in his estimation duties, but restricting disclosure of their contents to a select group of recipients (the "First Protective Order"). The district court found that the First Protective Order was essential to the fair and expeditious resolution of the Robins' Chapter 11 proceeding. The First Protective Order prohibited any person authorized to examine the Closed Files from disclosing "their contents, in part or in full, to any person not expressly authorized to such access by this or subsequent order of this Court." (Pet. App. at 49a.)

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and places upon the Trust full responsibility under that Plan for resolving all such claims.

On June 12, 1986, the Committee of Dalkon Shield Claimants (the "Claimants' Committee") filed an application for authorization to employ Glasser and two others as experts to assist it in evaluating Dalkon Shield claims. The Claimants' Committee recommended that Glasser's duties include the study of " 'representative' closed claims folders to determine available data and coding problems, design and select sample, design coding form and protocol [and] select coders" and the monitoring of "collection of closed claims data" in order to "assess for completeness, accuracy and usefulness" and "[b]uild an analytic data base."

On July 18, 1986, shortly after entry of its First Protective Order, the district court approved the application to employ Glasser and two others as experts to assist the Committee in its evaluation of Dalkon Shield claims. Glasser worked with Professor McGovern's group. By July 12, 1988, two years later, Glasser had billed a total of $307,156.25 in fees for his work evaluating Dalkon Shield claims.

Motivated by a continuing concern about confidentiality and "need to preserve all of the information contained in the files requested by Professor McGovern as well as the information contained in all other files relating to Dalkon Shield claims," the District Court entered another protective order on September 18, 1986 (the "Second Protective Order"). (Pet. App. at 52a.) Due to Professor McGovern's request for production of Closed Files "to assist him in his duties in this case," the Second Protective Order directed that the Closed Files be produced to court-approved experts, but again prohibited disclosure of their contents to other persons. (*Id.*)

On June 26, 1987, the district court entered another order (the "Third Protective Order") that further highlighted the sensitive nature of the material in the Closed Files and the restrictions on its use. The first paragraph of the Third Protective Order provided:

> DEEMING IT PROPER SO TO DO, it is ADJUDGED and ORDERED that any and all materials submitted or otherwise obtained by Professor Francis McGovern and/or other experts retained by Professor McGovern and authorized by the Court *for the purpose of evaluating and sampling Dalkon Shield claims* shall be deemed to be matters of strict confidentiality and shall include records of telephone inquiries, claim forms, medical records, financial records, correspondence or medical opinion letters and the like.

(Pet. App. at 55a.) (Emphasis added.) Release of the contents of "such materials to any person not expressly authorized access by the court was strictly prohibited, unauthorized disclosure being made subject to the penalty of contempt. (Pet. App. at 56a.) Before any authorized disclosure, the recipient was to be advised of the contents of the Third Protective Order and told that he or she was subject to the injunctive aspects of the order.

The First, Second and Third Protective Orders (referred to collectively as the "Protective Orders") made it clear that the Closed Files were to be disclosed only to a limited group and that such disclosure was only to be used in the district court's estimation process. From the first day of his employment as an expert, Glasser was subject to the Protective Orders and neither objected to their terms nor expressed any reservation about them.

After Glasser left his position, however, he went into business with his partner and attorney, John Lawson, forming a company called Medical Claims Consultants, Inc. ("MCC"). Glasser distributed solicitations to Dalkon Shield claimants stating that MCC would help each claimant evaluate her claim, discuss her claim with the Trust and provide "[e]pidemiological or statistical evaluation of [her] documented injuries to estimate the reasonable value of [her] claim *as compared to the historical claims of others injured by using the Dalkon Shield.*"

(emphasis added). This was precisely the comparison that Glasser made as a court-appointed expert, drawing upon historical data in the Closed Files. MCC planned to charge contingency fees varying from 16% to 25% of the claimant's recovery.

On June 22, 1989, Robins filed a Motion for Show Cause Order requesting that Glasser be directed to appear and show why he should not be held in contempt for violating the Protective Orders by working for MCC. On June 23, 1989, Glasser filed with the district court a request to be released from the Protective Orders. On June 26, 1989, Robins filed an application to hold its Motion for Show Cause Order in abeyance pending decision on Glasser's request. By order of June 26, 1989, the district court directed that Robins' Motion be held in abeyance pending resolution of Glasser's Motion and set his Motion for hearing on July 14, 1989.

On July 11, 1989, Glasser filed a "supporting Memorandom" for the district court's consideration. He and his present counsel and business partner, Mr. Lawson, appeared at the hearing on his Motion on July 14, 1989. Glasser was sworn, testified, was cross-examined by Robins' Counsel and argued his position. During his testimony, Glasser admitted that it was impossible to distinguish between information he learned from his examination of the Closed Files, and information he possessed before being retained as court-appointed expert. (Pet. App. at 20a.)

Although Glasser asserts that MCC "never affected any special qualification to perform functions because of Glasser's participation in the Robins case, see Glasser Brief at pp. 4-5, Glasser in fact advertised that MCC would provide epidemiological or statistical evaluation of documented injuries to estimate the reasonable value of the claims as compared to the historical claims of others injured by using the Dalkon Shield. Moreover, Glasser admitted at the hearing that he reviewed information re-

garding historical values of individual claims and that such information was covered by the protective orders. (Pet. App. at 27a-29a.)

After the hearings, the district court denied Glasser's motion. (Pet. App. at 9a, 10a.) The court found that:

> the Closed files contained information concerning the exact dollar amounts of judgments and settlements received by individual claimants prior to the filing of Robins' petition. It is exactly this data which was of crucial importance in reaching a valid estimation of Robins' total Dalkon Shield-related liability. The Court perceived that possession of this information, however, would also be very useful to anyone representing Dalkon Shield claimants in negotiations with or litigation against the Trust. Knowing the historical values placed upon particular types of injuries resulting from use of the Dalkon Shield would give a claimant a "leg up" on others in making demand for compensation upon the Trust.
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> * * * *
>
> In representing Dalkon Shield claimants and advising them as to the value of their claims, Glasser has necessarily utilized information gleaned from the Closed Files, even if he has not directly disclosed the data underlying his recommendations. It is simply impermissible for Glasser and his clients to use protected information, when other claimants and their representatives are forbidden access to it.

(Pet. App. at 14a-15a.)

On November 15, 1991, the Court of Appeals for the Fourth Circuit affirmed the district court's judgment. The court of appeals held that the district court's findings were not clearly erroneous inasmuch as there was evidence in the record that Glasser's involvement in MCC originated in part from his experience as a court-appointed expert in the Robins bankruptcy proceeding. (Pet. App. at 5a.)

ARGUMENT

I. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH ALL APPLICABLE DECISIONS OF THIS COURT.

Despite Glasser's contention to the contrary, certiorari should not be granted because the court of appeals' decision is consistent with decisions of this Court as well as with those of other courts of appeals.

Glasser wrongly argues that the court of appeals decision is inconsistent with *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1980), and *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984). The centerpiece of Glasser's argument is that his desire to parlay his experience as a court-appointed expert into a money-making scheme constitutes speech within the purview of the First Amendment. By mischaracterizing this case as one involving free speech, Glasser asserts that this Court's first amendment jurisprudence is dispositive.

Glasser does not, nor can he, show how his intended role in MCC is speech within the meaning of the First Amendment. The First Amendment authorities on which Glasser relies deal with the rights of the media and the public to have access to trial proceedings or material produced in pre-trial discovery. All involve Court orders or other restrictions placed specifically on communication, dissemination or access. None of them are even remotely analogous to this case.

In *Seattle Times*, upon which Glasser principally depends, the issue was whether a newspaper could publish sensitive information which it obtained as a litigant through discovery. This Court affirmed the Supreme Court of Washington's decision that a protective order pursuant to Fed.R.Civ.P. 26(c) prohibiting publication of such information did not run afoul of the First Amendment, where the order is issued for good cause. The Court held that an order prohibiting dissemination of discov-

ered information before trial is not a prior restraint on free speech. 467 U.S. at 34. The Court explained that such an order serves a substantial governmental interest in preventing abuse of the discovery process. *Id.* at 28.

Glasser does not complain that The Protective Orders forbid him from disseminating to the public the contents of the closed files. If that were his complaint, *Seattle Times* would be not only relevant, but dispositive in the Trust's favor. Rather, he complains that the Protective Orders prohibit him from using his personal knowledge of the contents of the Closed Files to advance entrepreneurial interests. Neither *Seattle Times*, nor any other first amendment decision precludes this result. As this Court has stressed " 'it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language, either spoken, written or printed.' " *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447-456-57 (1978) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949)).

Even if it is conceded that the activities from which Glasser must abstain rise to the level of speech, they are no more than commercial speech, inasmuch as they relate solely to Glasser's economic interests. *See Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). Commercial speech has a limited measure of protection commensurate with its subordinate position in the scale of First Amendment values. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. at 456. Commercial speech may be restricted if the restrictions: (1) seek to implement a substantial government interest; (2) directly advance that interest; and (3) reach no further than necessary to accomplish the objective. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). In *Board of Trustees v. Fox*, 492 U.S. 469, 106 L.Ed.2d 388 (1989), the Court explained that the means chosen to serve the government interest need

not be the least restrictive means. Rather, so long as the means chosen is reasonable, it will be upheld. 492 U.S. at 479. *See also Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986).

The Protective Orders directly further the District Court's substantial interest in safeguarding the integrity of its processes, including the appointment of experts in crafting complex reorganization plans. Permitting court-appointed experts to cash in on their experiences to the detriment of parties who acceded to thier appointment seriously undermines the integrity of the reorganization plan and the resulting claims resolution process.

II. THE COURT OF APPEALS APPLIED THE PROPER STANDARD OF REVIEW.

Continuing with his first amendment theme, Glasser argues that the court of appeals erred in its selection of a standard of review. In misplaced reliance upon *Bose Corp. v. Consumer Union*, 466 U.S. 485 (1984), Glasser contends that the court of appeals must review the record *de novo* because this case allegedly implicates the first amendment.

Bose Corp. is simply inapposite. In *Bose*, this Court ruled that in reviewing a district court's determination of whether there was actual malice in a product disparagement case, the court of appeals must apply a *de novo* standard of review. *Bose Corp.* had nothing whatsoever to do with review of a protective order.

In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1986), however, this Court affirmed the Washington Supreme Court's application of the abuse of discretion standard of review. 467 U.S. at 29. Unlike *Bose*, *Seattle Times* involved a first amendment challenge to a protective order.

III. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEALS.

Glasser's second argument in support of the issuance of certiorari is that the court of appeals' decision conflicts with the Sixth Circuit's decision in *National Polymer Products, Inc. v. Borg Warner Corp.*, 641 F.2d 418 (6th Cir. 1981). In that case, the court held that where information subject to a protective order had been disclosed at a public trial, the parties could not be enjoined from further disseminating the information.

A key distinction between *National Polymer* and this case is that there was no dispute in *National Polymer* that the protected information had become public. 641 F.2d at 421. In contrast, the materials in the Closed Files have never been disclosed to the public. Moreover, that which was disclosed at the estimation hearing, including documents reporting statistical aggregates were filed under seal and remained under seal. (Pet. App. at 56a.) Accordingly, the court's reasoning in *National Polymer* cannot obtain here.[2]

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[2] In any event, *National Polymer* is of dubious precedential value in light of *Seattle Times*.

CONCLUSION

Glasser has failed to articulate any sound basis for the issuance of certiorari in this case. The court of appeals' decision holding that the district court did not abuse its discretion in interpreting the three Protective Orders is consonant with the decisions of this Court as well as those of other federal courts of appeals. The petition for writ of certiorari should be denied.

Respectfully submitted,

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